IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
v.	:	**CRIMINAL NO. 17-258-01**
DAVID SIMAJ-SIMAJ	:	

GOVERNMENT'S SENTENCING MEMORANDUM

I. INTRODUCTION

On June 28, 2017, defendant David Simaj-Simaj entered an open plea of guilty to Count One of the Indictment in this case, charging him with illegal reentry after deportation, in violation of Title 8, United States Code, Section 1326(a). This charge arose from Simaj-Simaj's illegal reentry into the United States after having been deported and/or removed four times, on March 2, 2012, June 26, 2012, November 14, 2012, and May 6, 2013. A sentencing hearing has been scheduled in this case for Monday, August 7, 2017, at 10:00 a.m.

II. OFFENSE CONDUCT

The government's evidence established that the defendant is a native and citizen of the Guatemala. The defendant was arrested and placed in ICE custody on April 14, 2017; thereafter, he was transferred to the Federal Detention Center in Philadelphia on May 12, 2017. On May 11, 2017, the defendant was charged in an indictment by a grand jury sitting in the Eastern District of Pennsylvania with reentry after deportation, in violation of 8 U.S.C. § 1326(a).

A. Proof of Deportation

Defendant was deported from the United States back to his native country, Guatemala, on four prior occasions, that is, on March 2, 2012, June 26, 2012, November 14, 2012, and May 6, 2013. An immigration official witnessed each deportation/removal of the defendant and completed and I-296, Notice to Alien Ordered Removed for his first removal, and an I-205, Warrant of Removal/Deportation, in connection with his last three removals. The I-296 and I-205's contain the defendant's name, alien number, photograph, fingerprint and signature.

Forms I-205 and I-296 are each considered business records that are admissible as evidence to establish the prior deportation. Courts have regularly held that such documents, authenticated by an ICE agent, are admissible as public records (Fed.R.Evid. 803(8)(B)) and/or business records (Fed.R.Evid 803(6)), and sufficient to support a conviction. *See, e.g.*, *United States v. Green*, 2007 WL 3120328, *2-3 (3d Cir. Oct. 25, 2007) (agent introduced documents in immigration file); *United States v. Melendez-Torres*, 420 F.3d 45, 46-48 (1st Cir. 2005) (agent introduced documents in immigration file); *United States v. Aviles-Martin*, 230 F.3d 1368, 2000WL 119559 (9th Cir. 2000) (documents in INS "A" file properly admitted as business records); *United States v. Loyola-Dominguez*, 125 F.3d 1315, 1317-18 (9th Cir. 1997) ("A" file records, including warrant of deportation, arrest warrant and order to show cause, held admissible as public records); *United States v. Quezada*, 754 F.2d 1190 (5th Cir. 1985) (INS Form I-205, Warrant of Deportation, is admissible as public record).

Further, the testifying officer is not required to have personally observed this defendant's alienage, deportation, and lack of authorization for reentry. *Green*, 2007 WL 3120328, at *2-3 (holding that evidence was sufficient to sustain unlawful re-entry conviction, despite agent's lack of first-hand knowledge regarding items in immigration file, because agent testified about routine file maintenance procedure and responsibility); *Quezada*, 754 F.2d at 1196 (allowing agent testimony in alien re-entry case, remarking: "Given the sheer volume of cases handled by the INS, it is crucial that the government be able to rely on properly maintained and authenticated records to establish violations")

B. Proof of Illegal Reentry

Simaj-Simaj's arrest and presence in the United States subsequent to his effectuated deportation on May 6, 2013, supports the "found in" language in §1326(a)(2).

C. Proof of No Consent to Re-enter

A representative of the United States Customs and Immigration Service would testify that CIS has no record of any application for permission for him to re-enter the United States. At trial, this witness would authenticate a Certification of Non-Existence of Record, which would reflect that no record exists of an application by the defendant for permission from the Secretary of Homeland Security to reenter the United States, which has been obtained by CIS.

D. Proof of Identity

According to a Fingerprint Specialist from the Department of Homeland Security, the fingerprint recently taken from the defendant by ICE officials matches the fingerprints on the Forms I-296 and I-205 from his prior removals.

E. Proof of Alienage

The government is in possession Simaj-Simaj's A-file, which is devoid of suggestion that he had ever become a United States citizen.[1]

III. SENTENCING CALCULATION

A. Count One -- 8 U.S.C. §§ 1326(a) & (b)(2) (Illegal reentry after deportation by aggravated felon)

20 years imprisonment, $ 250,000 fine, a term of supervised release following imprisonment of not more than 3 years, $100 special assessment.

The maximum statutory penalty the defendant faces is, as follows:

20 years imprisonment, $ 250,000 fine, a term of supervised release following imprisonment of not more than 3 years, $100 special assessment.

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1 In United States v. Rodriguez, 356 F.3d 254, 260 (2d Cir. 2004), evidence of a prior deportation and lack of application for U.S. citizenship in the A-file was considered "overwhelming" evidence that a defendant was an alien.

B. Sentencing Guidelines Calculation.

As stated in the PSR, the correct guideline calculation is as follows. David Simaj-Simaj held accountable for a base offense level of 8, pursuant to U.S.S.G. § 2L1.2(a). PSR ¶ 22. With a two-level downward adjustment for Acceptance of Responsibility, the total offense level becomes 6. PSR ¶¶ 29-30. The total of the criminal history points is zero, resulting in a criminal history category of I. PSR ¶ 34. Based on a total offense level of 6 and a criminal history category of I, the guideline range for imprisonment is 0 to 6 months. PSR ¶ 46.

IV. ANALYSIS

A. Sentencing Guideline Range.

The Supreme Court has declared: "As a matter of administration and to secure nationwide consistency, the [Sentencing] Guidelines should be the starting point and the initial benchmark." Gall v. United States, 128 S. Ct. 586, 596 (2007). Thus, the Sentencing Guidelines remain an indispensable resource for assuring appropriate and uniform punishment for federal criminal offenses. As set forth above, the PSR correctly states that the effective sentencing guideline range that is applicable in this case is 0 to 6 months. See PSR ¶ 46.

B. Consideration of the Section 3553(a) Factors.

In addition to the Sentencing Guidelines, this Court must also consider all of the sentencing considerations set forth in Section 3553(a). Those factors include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need to afford adequate deterrence to criminal conduct, and to protect the public from further crimes of the defendant; (4) the need to provide the defendant with educational or vocational training, medical care, or other correctional treatment in the most effective manner; (5) the guidelines and policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense. 18 U.S.C. § 3553(a). A review of all pertinent factors supports the conclusion that, absent a motion for downward departure in this case, a sentence within the applicable guideline range of 0 to 6 months' imprisonment would be appropriate in this case.

The offense of conviction was serious. The evidence in this case confirms that David Simaj-Simaj, after having been previously removed from the United States on three separate occasions in during 2012, was deported from the United States on May 6, 2013 and transported to the Dominican Republic.

At the time of his deportation, immigration officials executed a Form I-205, Warrant of Deportation/Removal, in connection with the defendant's deportation; it contained the defendant's name, signature, photograph, alien number and fingerprint. It also contained the signatures of the immigration officials who fingerprinted Simaj-Simaj and who witnessed Simaj-Simaj's departure. Prior to his removal, immigration officials served Simaj-Simaj with an I-294, Warning to Alien Ordered Removed or Deported, which warned him that he was prohibited from entering, attempting to enter or being in the United States 'at any time" following his removal. The form also advised him that he was required to request and obtain permission from the Attorney General to reapply for admission to the United States following his deportation and that illegal re-entry was a crime under 8 U.S.C. §1326 and punishable by two to twenty years' imprisonment. The I-294 was signed by the immigration official who served the warning, and also contained the right index fingerprint of the defendant.

On April 14, 2017, deportation officers from ICE arrested the defendant in Doylestown, Pennsylvania. ICE officials interviewed the defendant, and he admitted to being in the United States unlawfully. He reported that he entered the United States on foot through Laredo, Texas on February 10, 2015. He was taken into ICE custody, and the indictment in this case followed.

Accordingly, in the absence of a government motion for a downward departure, the nature and circumstances of the offense would warrant a sentence of incarceration within the advisory sentencing guideline range and certainly no less than the applicable mandatory minimum sentence.

Simaj-Simaj's history and characteristics also would support the need for a sentence within the guideline range. The U.S. Probation Office has developed information to establish that while Simaj-Simaj has no prior criminal convictions, he has been removed and/or deported from the United States on four prior occasions. Thus, his status as a recidivist with five prior illegal entries into the United States would highlight the need for an appropriate sentence of incarceration in this case.

The advisory guideline range of 0 to 6 months' imprisonment takes into account the defendant's circumstances and the seriousness of his offense conduct. A sentence within the advisory sentencing guideline range would be necessary to reflect the seriousness of the offenses in this case, promote respect for the law, and provide just punishment for these offenses. Furthermore, a sentence of incarceration within the advisory guideline range would afford adequate deterrence to others who would commit a similar offense. 18 U.S.C. § 3553(a)(2). There is no need in this case to adjust the sentence in order "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . . ." 18 U.S.C. § 3553(a)(2)(D). Restitution is not an issue in this case. 18 U.S.C. § 3553(a)(7).

The defendant must be held responsible for his own actions. All the appropriate considerations of sentencing, including the nature of the offenses and the character of the offender, call for a term of incarceration within the applicable sentencing guideline range. Therefore, all of the appropriate considerations of sentencing favor the imposition in this case of such a sentence.

VI. CONCLUSION

In this case, a full review of all pertinent factors supports the conclusion that a sentence within the advisory guideline range of 0 to 6 months' imprisonment is appropriate in this case.

Respectfully submitted,

LOUIS D. LAPPEN
United States Attorney

s/JOSEPH T. LABRUM III
JOSEPH T. LABRUM, III
Assistant United States Attorney

Dated: August 3, 2017

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Government's Sentencing Memorandum has been served by me, this date, by electronic mail upon the following individual:

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s/JOSEPH T. LABRUM III
JOSEPH T. LABRUM III
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Date: August 3, 2017